

***United States Court of Appeals
for the Second Circuit***



**PETITIONER'S
REPLY BRIEF**

75-4209

C. A. No. 71-4278
(W. K.; Three-Judge Court)

USCA-2nd Nos.
75-4209 and 76-4103

United States District Court

SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 71-4278 (W.K.; Three-Judge Court)

C. ORVIS SOWERWINE, Trustee in Bankruptcy of
REA EXPRESS, Inc., a Bankrupt, *Plaintiff*,

v.

THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY, et al.,
Defendants.

United States Court of Appeals

FOR THE SECOND CIRCUIT

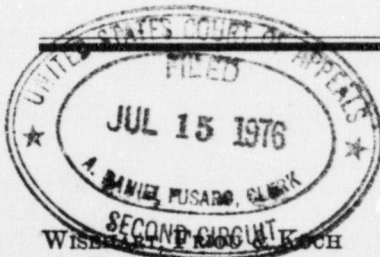
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C. ORVIS SOWERWINE, Trustee in Bankruptcy of
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v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE
COMMISSION, *Respondents.*

REPLY BRIEF FOR PLAINTIFF AND PETITIONER.
C. ORVIS SOWERWINE



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Introduction

The Joint Brief of the United States and the Interstate Commerce Commission does not say whether they think the policy declared in Section 10 of the Clayton Act should have been applied to the railroads' practice of using REA's sinking fund payments to create debt to themselves. They tell us only that "this Court is the proper forum for resolution of the status of the non-negotiable debt under the anti-trust laws." (Footnote 11, p. 26). We agree, but the Commission stated in its memorandum of September 5, 1972, in support of its motion to stay this anti-trust case that "the Commission will entertain whatever facts and arguments the parties desire to bring to its attention regarding the 1959 order" (Joint Brief, p. 16). An ostensible purpose of the stay was to let this Court have the Government's views as to Section 10's impact on the non-negotiable debt as an aid to the Court's decision.

The resulting stay was unsuccessfully appealed by REA to the Supreme Court on the ground that the Commission's review of the 1959 order would not aid this Court in resolving the anti-trust issues. It now appears that the four year delay in the anti-trust case resulting from the stay was never meant by the Commission or the Justice Department, the agencies responsible for enforcing Section 10, to provide this Court with their views as to the effect of this anti-trust law on the railroads' conduct.

This cavalier disregard of the Plaintiff's right to a timely adjudication of his anti-trust suit has been topped by the railroads' contention that the whole proceeding was a heads we win tails you lose exercise. Their brief says that in no event could the Commission's review of its 1959 order result in setting aside that order (p. 61). The Commission reference was, in their view, a purely dilatory device that would postpone an adverse decision by this Court indefinitely, without risking any Government action that could aid such a decision.

The Government's brief excuses its failure to aid this Court in evaluating the voluminous documents in the Commission's record concerning the non-negotiable debt by arguing that the 1959 SEOA approval immunized the railroads against Section 10 liability, before the 20a(2) order approving the 1959 conversion of that capital debt into bonded debt was entered. We shall show that, in 1959, the Commission knew that it could not immunize this Section 10 violation in a Section 5 proceeding and that it did not do so.¹

I. In 1959 the Commission Knew That It Could Not Immunize This Section 10 Violation in a Section 5 Proceeding and That the Creation of the Non-Negotiable Debt Was a Violation of Section 20a(2).

We agree with the Joint Brief that this Court should interpret the Commission's 1959 orders in light of what it then knew. In that year the Commission and the United States were formally asserting in the Supreme Court that self-dealing like that involved here "was not subject to the approval of the commission under Section 5 of the Interstate Commerce Act," as noted in our initial brief (p. 17).

In that case the Commission had decided a contest over control of the Toledo, Peoria and Western Railroad in favor of the Pennsylvania and the Santa Fe. 295 ICC 523, decided May 31, 1957. The Minneapolis railroad had tried unsuccessfully to show that its acquisition of the Western would have served the public interest better than a joint acquisition by the Pennsylvania and the Santa Fe. On review of this order by a three-judge Minnesota District Court, Minneapolis claimed, apparently for the first time, that the 50% of Western's stock bought by the Penn-

¹ We have tried to avoid repeating here the anti-immunity arguments made in our June 30, 1976 memorandum, filed in response to the railroads' summary judgment motion. We, of course, also rely on those arguments in this review proceeding.

sylvania had been acquired by it in violation of Section 10. The Court held that a mere reading of Section 10 showed it to be inapplicable to the allegedly illegal transaction and that even if that anti-trust law had been violated, the violation had been immunized because the joint acquisition of Western by Pennsylvania and Santa Fe had been found to be in the public interest by the Commission. 165 F. Supp. 893, 989, decided on September 16, 1958.

The case was argued in the Supreme Court, on Minneapolis' appeal, on November 16 and 17, 1959. The Commission had conceded in its brief that it could not approve under Section 5, a Section 10 violation like the one in our case, where a carrier was dealing with related persons in its own securities. The Court accepted this distinction. Footnote 13 at 361 U.S. 173, 190. The Court also accepted the Commission's argument that Section 10 did not preclude the Commission from approving a proposed acquisition of control under Section 5, where the Commission had considered and approved the anti-competitive effects as in the public interest. *Ibid.* at 191.

As we pointed out at Page 7 of our June 30, 1976 Memorandum, the Commission could have prospectively immunized the Section 10 violation charged here if it could have found in an earlier Section 5 proceeding that sanctioning that violation was in the public interest.²

The most obvious reason for the Commission's 1958-59 position in the Minneapolis case is that it could not then conceive of any publicly beneficial transportation objective that might be served by immunizing a carrier's management or its controlling owners from Section 10 liability in dealing with its own debts. Neither the Commission's 1975 report nor its Counsel's 1976 apologia for that report, suggests any public purpose that could be served by such immunization.

² The 1959 public interest findings actually made were explicitly limited to the "proposed pooling." 308 ICC 545, 551.

The Commission also knew in 1959 that the terms of a carrier's securities that had been approved under Section 20a(2) could not be materially altered without a further Section 20a(2) application. In that year the Court of Appeals for this Circuit held, in an opinion by Judge Friendly, that a contractual alteration of preferred stockholders rights in securities of the New Haven Railroad violated Section 20a(2) because it was made without any prior application for 20a(2) approval. *United States v. New York, New Haven & Hartford R. Co.*, 276 F.2d 525 (1959). In 1955 the New Haven had agreed with its bankers, as a condition of a ten million dollar loan, that the bankers could resell preferred stock to the New Haven at a price substantially in excess of what it cost them. On November 17, 1958 the Commission and the United States filed a complaint charging that this agreement violated Section 20a(2) because it had been made without Commission approval. In reversing a summary judgment for the bankers the Court of Appeals made two holdings that are relevant here.

The bankers had claimed an implied approval of the agreement by the Commission because the railroad's counsel had supplied copies to the Commission and its Director of Finance and discussed the matter with him when the agreement was made. The Commission had also noted its approval of collateral posted by the New Haven to secure this loan, in an inconclusive, related proceeding. 307 ICC 105, 112. The Court held that this conduct, plus a failure to disapprove the agreement, did not constitute approval. 276 F.2d 525, 533-34. The Commission in its 1958 suit, was thus resisting a claim of "inferential approval" like the one it was persuaded by the railroads to accept in 1975.

The Court also held that, although the agreement did not create a "security" within the meaning of 20a(2), it violated 20a(2) because it materially changed the terms of securities previously approved under 20a(2). The reason-

ing was that securities issued with Commission approval could not "be changed into quite different ones" without Commission approval. *Ibid.* at 531. The Court viewed the Commission's decisions holding that debts not evidenced by bonds or notes were outside 20a's coverage as irrelevant. It supported its judgment by pointing to the long line of Commission decisions holding that changing the terms of a security approved under 20a(2) required further 20a(2) approval.

Thus, in 1959 the Commission had not taken the erroneous view of 20a(2) coverage that its 1975 report espouses. In 1959 the Commission had persuaded the Second Circuit that Commission approval was needed when a carrier modified the terms of an outstanding security issue to get a \$10 million loan from its bankers. It seems unlikely that the Commission would then have found 20a(2) inapplicable to conversion of a carriers' bonded indebtedness into interest bearing "non-negotiable debt" to its owners. In any event this Second Circuit decision should control the decision of this Court.

There is no reason to suppose that the 1959 Commission thought Section 10's coverage of security issues was any narrower than Section 20a's. There are also sound reasons for believing that the 1959 Commission would not have accepted the Intervenor's claim that their conversion of REA's public debt into private debt to its owners did not violate Section 10 because REA was a mere agent of those owners.

In 1947 the Tax Court had allowed REA to deduct depreciation charges that the Internal Revenue Service claimed were excessive. 8 Tax Ct. 991. The Government's claim was that REA's true income had been understated by excessive deductions and its challenge to REA's excessive depreciation deductions was sustained by the Second Circuit. *Railway Express Agency, Inc.* 169 F.2d 193 (1948).

In attempting to justify these deductions REA argued that because it was a non-profit, joint venture of the railroad owners, it made no difference what business deductions it made because any deductions taken by REA would result in greater income to its railroad owners. The Second Circuit rejected this contention on the ground that, having chosen to conduct their express business through a separate corporation, the railroads' could not have both the business advantage of such a corporation and the advantage of allocating income between REA and the railroads in whatever manner seemed most advantageous to them. The Court held that REA was therefore subject to the same rules as those applied to other corporations. 169 F.2d 193, 196.

This 1948 decision established the speciousness of the railroads' current claim that REA was a corporation not subject to general corporate law. This decision has not been overruled or reversed and constitutes the law of this case today. It makes directly applicable to REA the creditor fraud decisions cited at page 27 of our initial brief.

What are the facts presented to the Commission in 1959 that are now thought to have justified a conclusion that the railroads conversion of REA's capital debt to them into fourteen year notes, placing that debt on an equal footing with debts owed to general creditors, was in the public interest? We judge from the Commission's formal lodgement of the 1959 hearing record in this Court that these facts are supposed to be found in that record. We shall therefore next turn to what was done and not done in that hearing.

II. The 1959 Hearing Covered Up the Facts Material to Any Decision as to Whether This Conversion Would Serve the Public Interest.

We appreciate the Government's candor in lodging the transcript of the 1959 hearing with this Court on June 30,

1976. However, it is not possible to understand fully what the witnesses were saying about the changes made in the 1954 SEOA by the 1959 SEOA, with at least one referring to the terms of these agreements. The provisions material to the 1959 change in the status of the non-negotiable debt are Article 17 of the 1954 SEOA, and Article 16 of the 1959 SEOA. For comparison we have printed these two Articles in full as an appendix to this brief.

Section 5(a-f) of Article 17 in the 1954 SEOA subordinated the railroads' "advances" to all other liabilities of REA (App. 4a-7a) and Section 5(g) defined as "capital debt" the total "advances" plus "the stated value of Express Company Capital Stock" (App. 7a-8a). Thus, in the event of liquidation, each of REA's railroad stockholders would receive a pro-rata share of any excess of REA assets over liabilities to non-stockholders, fixed by its total capital investment in REA. This investment was defined as the money paid for its capital stock plus the money it "advanced" to REA to retire its bonded debt.

By Article 16 of the 1959 SEOA any railroad could withdraw without liability for REA's debts (Section 2, App. 10a) by selling its stock to REA at cost (Section 3, App. 11a). There was no occasion for the 1959 SEOA to deal with the Railroad "advances" because they were to be converted into 14 year notes, subordinate only to REA's *then fixed debt owed to others*. Approval of this conversion of REA's capital debt into interest bearing debt not subordinated to debts owed general creditors was then a matter of legitimate concern to existing general creditors and to members of the public who might become such creditors, while this new \$27 million in bonded debt remained unliquidated. No creditors appeared at the hearing.³ Their interests were presumably represented by the Commis-

³ As we pointed out at page 20 of our initial brief REA's public announcement of the proposed reorganization gave no hint that it would affect creditors' rights.

sion as the statutory guardian of the interests of the general public in this transaction.

The Commission, with a great show of public concern, assigned not one but two examiners to the proceeding, neither of whom asked a question or wrote a report. These examiners then heard REA's President and three railroad Presidents extoll their own virtues without discussing what they were doing to REA's present and future general creditors. Only REA's President even mentioned the proposed conversion of REA's capital debt to the railroads into long term notes. And he was careful not to point out that this conversion would change the status of REA's railroad owners from claimants to \$27 million allegedly contributed by them to REA as capital, to \$27 million creditors on a par with anyone who was then a general creditor or might become one. What he said was:

The treatment of the advances which was spelled out in Article 17 of the present Agreement has been taken care of by the proposal to issue notes containing the terms of the Express Company's obligation to pay. As I said, an application for authority to issue the notes will be filed with the Commission." (Transcript of August 18, 1959 hearing, p. 28-29).

This statement implies that the propriety of converting the capital debt described in Article 17 into ordinary debt would be considered by the Commission in the notes case although the Commission now contends that it was considered and approved in the contract case hearing.

The Commission's 1976 finding, made in denying REA's petition for reconsideration, that the 1959 Commission was not misled in any material respect by the railroads' presentation is based on an odd concept of materiality. The railroads did not disclose to the Commission that Lehman Brothers had offered to liquidate this debt in two years at 4% interest if allowed to own and operate REA for its

own benefit, instead of the railroads'.⁴ This was a material consideration in determining whether the future of REA as a common carrier of express shipments would be better served by issuing 14 year notes at 5 percent, to its railroad owners. The owners proposed to liquidate this debt only out of profits that were unlikely to materialize and were not in fact achieved under their ownership.

Lehman Brothers recognized that REA's prospective gross revenues were ample to retire this capital debt promptly and proposed to remedy REA's notoriously undercapitalized condition by doing it with gross revenues in two years. It requires no hindsight to see that if the Commission had known about this offer it could not rationally have approved a debt structure that virtually guaranteed REA's ultimate insolvency.

According to the Commission's present contention, it was actually considering in the Section 5(1) proceeding what its 20a(2) order said it considered in that proceeding. If the Commission's present contention is accepted as correct, the 5(1) hearing is where evidence should have been offered to support REA's conversion of what had been labeled by it and its railroad owners as capital debt into 14 year notes, bearing 5% interest.

Yet the Commission approved this insolvency threatening change in the posture of the non-negotiable debt without testimony from anyone that the change would serve any public purpose. None of the four witnesses even attempted to rationalize this radical change in REA's financial structure. They simply ignored it and so did the Commission.

The 1959 Commission could not have been publicly indifferent to a collapse of REA, then threatened by its undercapitalization. The Commission did not need a warn-

⁴ The terms of this offer are set out in the appendix to our June 30, 1976 brief in opposition to the Defendants' June 1, 1976 summary judgment motion.

ing from Booz, Allen & Hamilton that it too might suffer political retaliation if it gave an "overt" sanction to that under capitalization.⁵ The Commission was in the unfortunate position of having known for a long time that REA's under capitalization was a product of the railroads' treatment of REA's express revenues as their own and having done nothing about it. It could not tell a Congressional Committee investigating an REA failure that this systematic under-capitalization of REA was an accident.

The Commission was therefore just as anxious as the railroads to have the public believe that the 1959 reorganization would save REA. The Commission had no taste for dealing with the ugly reality of the railroads' thirty year mis-use of REA's sinking fund. It therefore confined its published opinion to applause for REA's new found theoretical freedom to make a profit by choosing the mode of transportation best adapted to express service, whether it was rail, air, truck or bus. The practical continuance of railroad domination of these theoretical choices by continued railroad ownership, plus their permanent domination of even an independently owned REA, assured by the \$27 million note issue, were matters the Commission did not think should cloud its rosy picture. Publication of its 20a(2) approval order, which simply treated the conclusory public interest allegations of the application as established ultimate truth, might have raised questions instead of reassuring the public that the Commission was guarding its interests.

Even accepting the Respondents' argument that Commissioner Walrath's participation in both the notes case and the contract case made these separate proceedings one, there is nothing in either proceeding to suggest that Walrath or any other Commissioner considered the public interest implications of the note issue's threat to REA's future solvency. We submit that the 1959 approval of

⁵ The reference here is to REA Ex. 62, discussed at p. 19 of our initial brief.

the \$27 million note issue without a hearing or opinion was a transparent device for avoiding the thought about REA's financial future that the Commission should have supplied but did not care to indulge in.

III. The Bankruptcy Judge Needs Prompt Guidance as to the Validity of the Railroads' Notes.

The Petitioner was authorized by Judge Galgay to seek this review of the Commission's approval of the 1959 note issue in order to resolve urgent problems raised by REA's bankruptcy. Those problems will not go away, no matter how long the Respondents and Intervenorers cling to the pre-bankruptcy caption of this case. The Respondents' brief refuses to admit that these problems are even relevant. The Intervenorers' brief has at least addressed these problems by suggesting subordination of the railroads' notes as a solution less painful to them than invalidation (p. 54).

The Intervenorers' brief cites an REA press release of February 11, 1975 as evidence that the 1959 note issue did not contribute to REA's bankruptcy. What REA's President there pointed out was that, after repudiation of the notes in 1971, REA had made a 1974 profit of \$2.8 million. The "carefully planned recovery program" he referred to was not one that embraced refunding of the \$27 million debt to the railroads, repudiated in 1971 by the refusal to continue the burdensome interest payments and in 1973 by a further refusal to make any payment on principal at maturity. There is no evidence of any kind, by press release or otherwise, that REA's new owners could have staved off bankruptcy by liquidating or refinancing this \$27 million obligation at any time.⁶

⁶ The Joint Brief's contribution to the controversy over what caused REA's bankruptcy is a curious contradiction, at pp. 19-20, of the facts found in the Commission's opinion. We are told in the brief that if REA's liquidation had been a certainty in 1959, "it appears strange that a sophisticated and knowl-

The Bankruptcy Judge must, in any event, take appropriate action if this Court finds, as we submit it should, that this note issue was invalid. Whatever, he may decide is subject to review in the District Court and to further review in the Court of Appeals for this Circuit. This Court is now sitting by special designation, as a Court that has power to decide the ultimate fate of these notes. It now has before it a factual record concerning the notes more extensive than any likely to be made in subsequent proceedings.

In these circumstances we do not think it is unreasonable to ask this Court to decide now whether this note issue was void ab initio. If it so decides we are not asking it to enter a money judgment against anyone. What we have argued is that REA's general creditors are equitably entitled to a return of the interest collected by the railroads on these notes. Whether that return should be accomplished by set-offs or recoupment proceedings or both is a matter for decision in the first instance, by the Bankruptcy Judge. But without a controlling decision from this Court on this issue, the bankrupt estate must suffer further litigation of indefinite length regarding the validity of the railroads' claims.

edgeable group of REA officers would have purchased REA in 1969 for some \$29 million (\$2 million in cash plus \$27 million in REA obligations on the 1959 notes)." Those officers did not, as this statement erroneously suggests, make themselves liable on the notes. Their judgment in paying more than \$2 million for the stock of a company with a negative net worth of \$10 million may have been questionable, but they did not suffer from the extreme madness mistakenly attributed to them by the Joint Brief.

CONCLUSION

We again respectfully submit that this Court should declare the notes void as a fraud on REA's general creditors; a fraud that makes the railroads note holders equitably liable for repayment to the Trustee of the interest on the notes they collected from REA. Some of the noteholders are themselves in bankruptcy and we do not suggest that this Court should try to resolve disputes between a bankrupt debtor and its bankrupt creditors. We do suggest that this Court is in a unique position to resolve promptly and finally the question of whether these notes were validly issued and that it should do so.

Respectfully submitted,

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APPENDIX



APPENDIX

Excerpt from 1954 SEOA. Pages 47-53

ARTICLE 17

RULES OF INTERPRETATION, AMENDMENTS, TERMS OF
AGREEMENT AND FINAL SETTLEMENT OF ACCOUNTS

Section 1(a). This agreement is made in the State of New York and questions of its interpretation and effect shall be governed by the laws of that State.

Rules of
Interpretation

(b) All headings, sub-headings, and captions herein are inserted for convenience only, and shall not affect any construction or interpretation of this agreement.

(c) The provisions of this agreement are agreed to by both the Rail Company and the Express Company as being inseparable and interdependent, and not subject to amendment except as may be agreed to by all parties to this form of agreement.

Agreement to
Be Uniform
at All Times

Section 2. Subject to such approval of federal, state or foreign authorities as may be required by law, this agreement shall take effect on March 1, 1954, and continue in force until midnight on December 31, 1973, subject to the provisions of Sections 5 and 6 of this Article.

Term of
Agreement

Section 3. Notwithstanding Section 2 of this Article, the Rail Company may withdraw entirely, but not in part, from this agreement on the first day of any month after midnight on December 31, 1958, provided that it has first given at least eighteen months' advance written notice to the Express Company. When such notice is given by any other Rail Company party to this form of agreement, the Rail Company may withdraw on the same date as such other Rail Company provided that it gives the Express Company written notice of intention to do so

Withdrawal
by Rail Company

at least one year prior to such date. The Express Company shall forthwith advise all Rail Companies party to this form of agreement of any notice received under this Section.

Section 4. When and if the Rail Company ceases to be a party to this agreement by withdrawal under Section 3 of this Article, its rights and obligations shall be as follows:

Rights and
Obligations
Upon
Withdrawal

(a) With respect to all expenses and liabilities of the Express Company, of whatever kind or description, both recorded and unrecorded, as of the date of withdrawal, including, without limiting the generality of the foregoing, claims or possible claims for loss and damage, personal injuries, pensions and retirement costs and accruable liabilities therefor, taxes, and vacation costs and liabilities, and excepting only any liability to Rail Companies for advances, the Chief Accounting Officers of the Express Company and of the Rail Company shall, subject to approval of the Board of Directors of the Express Company, estimate or otherwise determine the amounts thereof which would be borne by the Rail Company under the provisions of this agreement as if all such items were accounted for on the books of the Express Company at the date of withdrawal. If the Chief Accounting Officers of the Express Company and of the Rail Company do not agree upon an estimate or other determination, or if the estimate is modified by the Board of Directors and is unacceptable to the Rail Company, the dispute shall be arbitrated as provided in Article 15.

Cash Settlement
as to Open
Accounts

(b) With respect to all assets of the Express Company, of whatever kind or description, as of the date of withdrawal, including, without limiting the generality of the foregoing, all investments in securities, prepaid or suspense items, and all cash and

claims of the Express Company growing out of the express transportation business or out of any other business conducted by the Express Company, and excepting only real and tangible personal property not specifically mentioned in this paragraph, the Chief Accounting Officers of the Express Company and of the Rail Company shall, subject to approval of the Board of Directors of the Express Company, estimate or otherwise determine the amounts thereof which would be credited to, or insure to the benefit of, the Rail Company under the provisions of this agreement as if all such items were accounted for on the books of the Express Company at the date of withdrawal. If the Chief Accounting Officers of the Express Company and of the Rail Company do not agree upon an estimate or other determination, or if the estimate is modified by the Board of Directors and is unacceptable to the Rail Company, the dispute shall be arbitrated as provided in Article 15.

(c) No member of the Board of Directors of the Express Company who is an officer or employee of the withdrawing Rail Company or of a railroad system of which the withdrawing Rail Company is a part shall vote in Board action under paragraph (a) or (b).

(d) The difference between the total amount of liabilities estimated under paragraph (a) and the total amount of assets estimates under paragraph (b) shall be settled between the parties in cash, promptly after withdrawal or as soon thereafter as the difference is finally determined.

(e) The Rail Company shall purchase from the Express Company, at the adjusted basis for determining gain under the applicable provisions of the Internal Revenue laws as of the date of withdrawal, all buildings on land owned by the Rail Company.

Purchase
of Express
Company
Property by
Withdrawing
Rail Company

The Rail Company may, if it so elects, purchase at appraised value as of the date of withdrawal, but at not less than the adjusted basis for gain for Federal tax purposes, and must, if the Express Company so demands, purchase at the adjusted basis for gain for Federal tax purposes any other buildings or land owned by the Express Company, provided that such buildings or land are used solely or chiefly on the lines of the Rail Company. The Rail Company may if it so elects, and must, if the Express Company so demands, purchase at the adjusted basis for gain for Federal tax purposes any vehicles, equipment, railroad cars or other property owned by the Express Company and used solely or chiefly on the lines of the Rail Company. The purchase price of the property acquired by the Rail Company under this paragraph shall be applied against any outstanding advances by the Rail Company to the Express Company, up to 75 per cent of such advances.

(f) Any outstanding advances by the Rail Company to the Express Company remaining after application of purchase price as provided in paragraph (e) of this Section shall bear the same rate of interest as borne by similar indebtedness owed by the Express Company to other parties to this form of agreement, and shall be repaid in the same proportions and at the same time that repayment is made to such other parties.

Advances

(g) All Express Company capital stock owned by the Rail Company shall be sold by it, and purchased by the Express Company, at original cost.

Stock Held
by Rail Company

Section 5. On January 1, 1973, or one year prior to any date earlier than January 1, 1974 that this agreement might be lawfully terminated as to all Rail Companies then party to this form of agree-

Settlement of
Accounts and
Liquidation of
Express
Company

ment, the Board of Directors of the Express Company shall, unless it ascertains that a new agreement will be executed between the Express Company and all Rail Companies then party to this form of agreement which will provide for final settlement of any advances still owed by the Express Company to all Rail Companies which have withdrawn from this form of agreement under Section 3 of this Article, implement a plan for settlement of accounts and liquidation of the Express Company in accordance with the following, to the extent lawful:

(a) An estimate shall be made, at least twelve months prior to the termination date of the agreement, of all expenses and liabilities of the Express Company, of whatever kind or description, both recorded and unrecorded, as of the termination date of the agreement, including, without limiting the generality of the foregoing, claims or possible claims for loss and damage, personal injuries, pensions and retirement costs and accruable liabilities therefor, taxes, and vacation costs and liabilities, excepting only any liability to Rail Company for advances.

(b) An estimate shall be made, at least twelve months prior to the termination date of the agreement, of all assets of the Express Company, of whatever kind or description, as of the termination date of the agreement, including, without limiting the generality of the foregoing, investments in securities, prepaid or suspense items, and claims of the Express Company growing out of the express transportation business or out of any other business conducted by the Express Company, excepting only real and tangible personal property not specifically mentioned in this paragraph.

(c) If the total amount of liabilities estimated under paragraph (a) exceeds the total amount of as-

Withholding of
Rail
Transportation
Revenue to
Meet Open
Account
Liabilities

sets estimated under paragraph (b) of this Section, such excess shall be tentatively apportioned among groups, as defined in Section 3 of Article 10, on the basis of the proportion of the total of the charges and items of expense listed in items (a) to (f), inclusive, of Section 9 of Article 10, including any adjustment made pursuant to Section 8 of Article 10, borne, or to be borne, by each group during the entire period of this agreement, including estimates for the final year it is in effect.

(d) An estimate shall be made of the percentage of Rail Transportation Revenue necessary to be withheld from each group during the last twelve months the agreement is in effect in order to provide an amount of money equal to that tentatively apportioned to the respective groups under paragraph (c) of this Section; such amounts shall accordingly be withheld from the groups as loans made to the Express Company by the Rail Companies in the respective groups.

(e) Until all Express Company liabilities of the type described in paragraph (a) of this Section have been paid or provided for, the Express Company shall, except for the withholding required by paragraph (d) of this Section, continue to maintain its books and discharge its obligations under this agreement. The amount, if any, by which payments due the Rail Companies in any group, under Article 10 of this agreement, fail in any month to meet the expenses chargeable against that group for the month, shall be charged against the loans made under paragraph (d) of this Section. Any group's loans not thus consumed, after payment of all Express Company liabilities of the type described in paragraph (a) of this Section, shall be credited to the group and paid to the Rail Companies in the group in the

Settlement
of Express
Company
Liabilities,
Other Than
Advances Owed
to Rail
Companies

proportions which each received of the total Rail Transportation Revenue if the group during of withholding under paragraph (d) of this Section. If any group's loans are consumed, as provided herein, before payment of an Express Company liabilities of the type described in paragraph (a) of this Section, the Rail Companies in the group shall pay the Express Company an amount necessary to meet all such Express Company liabilities, in the proportions which each received of the total Rail Transportation Revenue of the group during the period of withholding under paragraph (d) of this Section.

(f) The Rail Company shall purchase from the Express Company, at the adjusted basis for determining gain under the applicable provisions of the Internal Revenue laws as of the date of termination of the agreement, all buildings on land owned by the Rail Company. The Rail Company may, if it so elects, purchase at appraised value as of the date of termination of the agreement but at not less than the adjusted basis for gain for Federal tax purposes, and must, if the Express Company so demands, purchase at the adjusted basis for gain for Federal tax purposes any other buildings or land owned by the Express Company, provided that such buildings or land are used solely or chiefly on the lines of the Rail Company. The Rail Company may if it so elects, and must, if the Express Company so demands, purchase at the adjusted basis for gain for Federal tax purposes any vehicles, equipment, railroad cars or other property owned by the Express Company and used solely or chiefly on the lines of the Rail Company.

Purchase of
Express
Company
Property
by Rail
Companies

(g) All real and personal property not purchased by Rail Companies from the Express Company un-

Final
Distribution

der paragraph (f) of this Section shall be sold and the proceeds, together with the proceeds from sales under paragraph (f), shall be distributed among the Rail Companies at any time party to this form of agreement in the same proportion as the capital debt owed by the Express Company to each such Rail Company at the time of liquidation bears to the total amount of such capital debt, in complete liquidation of the property and capital debt of the Express Company. For the purposes of this paragraph, capital debt shall consist of advances carried on the books of the Express Company and the stated value of Express Company capital stock.

Section 6. Any dispute between the Express Company and the Rail Company arising under or with respect to the application of any provision of this Article shall be determined as provided in Article 15.

Arbitration

Excerpt from 1959 SEOA. Pages 51-52

ARTICLE 16

RULES OF INTERPRETATION, AMENDMENTS, AND
WITHDRAWAL BY RAIL COMPANY

SECTION 1(a). This agreement is made in the State of New York and questions of its interpretation and effect shall be governed by the laws of that State.

Rules of
Interpretation

b) All headings, sub-headings, and captions herein are inserted for convenience only, and shall not affect any construction or interpretation of this agreement.

(c) The provisions of this agreement and those in effect between the Express Company and other Rail Company covering the transportation of express traffic in passenger, mail or express trains shall be uniform at all times. Such agreements shall not be amended except with the consent of Rail Companies representing not less than eighty-five percent (85%) of the total assigned car-foot miles of all Rail Companies parties to this form of agreement for the last twelve calendar months for which such data are available at the time such amendment is referred to the Rail Companies by the Board of Directors of the Express Company. In the event that it is so amended the amendment shall be binding on the Rail Company with or without its consent, but any amendment which does not receive the unanimous consent of all parties to this agreement shall not be retroactive and shall not be effective sooner than ninety days after the rail companies parties to this agreement have been notified by the Express Company that such amendment has been approved by the number of rail companies necessary for its adoption. The Rail Company, if not assenting, shall have the right, notwithstanding the provisions of Section 2 of this Article, to serve, not later than

Agreement to
Be Uniform
at All Times

Rights of Rail
Company if
Agreement
Amended
Without its

sixty days prior to the effective date of the amendment, notice of withdrawal from this agreement on such effective date or on any date thereafter it may select. In the event any other rail company shall serve notice of withdrawal in accordance with the provisions of this paragraph, the Rail Company shall have the right to serve, within thirty days thereafter, notice of its withdrawal from this agreement on the date specified in the notice of such other rail company. Any rail company withdrawing in accordance with the provisions of this paragraph on a date after the effective date of the amendment shall be bound by the terms of the amendment during the interim period.

SECTION 2. The Rail Company may withdraw entirely, but not in part from this agreement:

Withdrawal by
Rail Company

(a) On June 30, 1961, provided it has given to the Express Company at least ninety (90) days' advance written notice of intention to withdraw. If any other rail company party to this form of agreement gives such a ninety days' notice the Rail Company may withdraw on June 30, 1961, provided it has given to the Express Company at least sixty (60) days' advance written notice; or

(b) On the first day of any month after June 30, 1961, provided that it has first given at least twelve (12) months' advance written notice to the Express Company. When any such twelve (12) months' notice of withdrawal is given by any other Rail Company party to this form of agreement, the Rail Company may withdraw on the same date as such other Rail Company, provided that it gives the Express Company written notice of intention to do so at least eight (8) months prior to such date.

The Express Company shall forthwith advise all Rail Companies party to this form of agreement of any notice of withdrawal received under this Section.

SECTION 3. All Express Company capital stock owned by the Rail Company shall, in the event of withdrawal of the Rail Company under any of the provisions of this Article, be sold by it, and purchased by the Express Company, at original cost.

Stock Held by
Rail Company

C. ORVIS SOWERWINE, Trustee in
Bankruptcy of REA EXPRESS, INC.,
a Bankrupt,

v.

Defendants.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

C. ORVIS SOWERWINE, Trustee in
Bankruptcy of REA EXPRESS, INC.,
a Bankrupt,

v.

Respondents .

Nos. 75-4209 & 76-4103

1a

CERTIFICATE OF SERVICE

I hereby certify that the ^{Reply} Brief on behalf of the Plaintiff-Petitioner has been served this day upon the following counsel, by hand delivery to those listed in Washington, D.C., and by depositing same in the United States mail, postage prepaid, to those listed in other cities.

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July 14, 1976

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